MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

MALAYSIAN AIRLINES SYSTEM BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED AZMI J
[CIVIL SUIT NO. 1205 OF 1978]
23 DECEMBER 1981

CONTRACT: *Equitable assignment - Principles - Necessary prerequisites - Assignment of moneys due under a contract to a third party - Whether equitable assignment - Language used - Whether intention clear that assignee was to have the benefit of the chose in action - Fundholder thereof - Whether became trustee for assignee.*

By an agreement entered into between the defendant (MAS) and Bahagia Trading Sdn Bhd (Bahagia), the latter undertook to supply to MAS punch cards, computer cards and forms amounting in value to RM 64,542. Bahagia had agreed to assign and transfer to the plaintiff (MIMB) the whole of moneys due and payable to it by MAS under the agreement as a consideration of and a further collateral security for a loan of RM 400,000 granted to it by MIMB. A deed of assignment was forwarded to and signed by MAS. This deed had been signed by MIMB but was only later executed by Bahagia. Despite the assignment, MAS did not pay the moneys due under the agreement to MIMB, but instead transmitted all the payments to Bahagia. MIMB claimed the moneys due under the agreement and contended that an equitable assignment had existed as to make MAS liable for the payment.

Held:

[1] When MAS executed the documents (i.e. the five copies of the assignment deed) on 2 July 1975, in acknowledgment of the assignment, the documents were already executed by MIMB as assignee, though Bahagia, as assignor, had not signed them.

[2] In equitable assignment, no particular form of words is required. The only thing that is necessary is to make the meaning plain. The words must clearly show an intention that the assignee is to have the benefit of the chose in action. The assignment may be addressed either to the debtor or to the assignee. In the instant case, therefore, there must be a clear intention on the part of Bahagia/assignor that MIMB is to have the moneys due from MAS under the contract between Bahagia and MAS, and that Bahagia must address the assignment either to MAS or MIMB.

[3] Upon scrutiny of the correspondence in exhibits P1, P2 and P3, it is clear that, as between Bahagia and MIMB, there was a clear intention on the part of Bahagia that in consideration of the loan of RM 400,000, it would assign to MIMB, *inter alia*, MAS contract to the value of RM 64,542. This equitable assignment was complete and became absolute when the acceptance of the terms and conditions as set out in the Heads of terms in P2 was executed by Bahagia by 25 June 1975.

[4] The facts also showed that notice of the equitable assignment was made to MAS on 2 July 1975 when it acknowledged the assignment. The effect of this acknowledgment is that as from 2 July 1975, MAS as stakeholder became a trustee for MIMB in respect of moneys due under MAS contract with Bahagia, and MAS is liable for any payments made to anybody else other than MIMB, unless made with consent of MIMB.

[5] In equitable assignment it is immaterial that Bahagia/assignor did not sign the deed of assignment till 18 March 1976. On the facts, an enforceable equitable assignment was already created by 25 June 1975. The signature of Bahagia, in the circumstances here, is a mere formality. In any case, by its silence, Bahagia has consented to and confirmed the existence of the assignment by 25 June 1975, i.e. before the first payment was made by MAS to Bahagia.

[6] MAS, as a debtor and stake-holder is liable to pay the sum of RM 62,358 to MIMB, although it has already paid this sum to Bahagia, albeit in breach of trust.

[Judgment for plaintiff.]

Cases referred to:
William Brandt's Sons & Co. v. Dunlop Rubber Company [1905] AC 454
James Talcott Ltd. v. John Lewis & Co. Ltd. [1940] 3 All ER 592
Rossiter v. Miller [1878] 3 AC 1124
Palmer v. Culverwell Brooks & Co. [1902] 85 LT 758
In re Patrick [1891] 1 Ch 82
Malayawata Steel Bhd. v. Government of Malaysia [1980] 2 MLJ 103
Sanders & Co. v. Peek [1884] 50 LT 630

Legislation referred to:
Civil Law Act 1956, s. 4(3)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 6, paras. 30, 32, 41, 70
Snell's Principles of Equity, 27th Edn., p. 78

For the plaintiff - C.V. Das; M/s Shook Lin & Bok
For the respondent - Chin Yew Meng; M/s Allen & Gledhill

JUDGMENT

Mohamed Azmi J:

This is a claim by Malaysian International Merchant Bankers Berhad (MIMB) as assignee of a debt due from Malaysian Airlines System Berhad (MAS) to Bahagia Trading Sdn. Bhd., in respect of certain contracts, the particulars of which are contained in Exhibits AB8 to AB11, and summarised in para. 3 of MAS's statement of defence. Although the claim is for the sum of RM64,542, it is now conceded by the plaintiff that from the particulars of payments made by MAS to Bahagia/assignor, only the sum of RM62,358 can be due and payable to MIMB under the deed of assignment dated 18 March 1976. (See Exhibits AB1 to AB12). In the circumstances, if MAS were liable under legal or equitable assignment as a debtor or stake-holder, the plaintiff could only obtain judgment in the sum of RM62,358 and not RM64,542.

At the commencement of these proceedings, certain agreed issues of facts and law are recorded for the determination of the Court. On facts, the only issue for determination is whether, when the 1976 deed of assignment was sent to MAS vide letter dated 26 June 1975 (AB13), the document was already executed by MIMB - the plaintiff/assignee. On law, two issues have been agreed. Firstly, whether on the evidence, there is an assignment in law or equity, and, secondly, if there is an enforceable assignment in law or equity, when was the effective date of the assignment? From the final submission of Counsel for MIMB, it is conceded that plaintiff's claim would stand or fall on the principle of equitable assignment. In my view, it is obvious that the plaintiff cannot succeed if it were to prove its claim under legal assignment as no statutory notice was given to MAS as stake-holder as required by s. 4(3) Civil Law Act 1956. Proper notice was only given *vide* letter dated 22 April 1976 (AB15) when assignee's copy of the deed of assignment was forwarded to MAS, but by that date,

the fifth and final payment had already been made by MAS to Bahagia, leaving practically nothing to be assigned. That being the case, the only issue of law is whether there was an equitable assignment, and, if so, whether it was already effective before MAS made the first payment to Bahagia/assignor on 12 September 1975, and the other four subsequent payments as particularised in para. 7 of statement of agreed facts. On the principle of equitable assignment, the dispute in the present case can be narrowed down to whether an equitable assignment had come into force by 2 July 1975, as pleaded in para. 3 of plaintiff's reply.

From the statement of agreed facts and agreed bundle of documents, it is common ground that at the material time there was a contract between MAS and Bahagia for the supply to MAS of punch cards, computer cards and forms, for a total sum of RM64,542. Bahagia had agreed to assign and transfer absolutely to MIMB the whole of moneys due and payable to it from MAS under the said contract as a consideration of and a further collateral security for a loan of RM400,000 granted to it by MIMB. By Exhibit AB13, the letter dated 26 June 1975, five copies of the assignment deed were forwarded by MIMB's solicitors to MAS for execution, although at that time the documents were not yet executed by Bahagia/assignor. Exhibit AB13, which was copied to Bahagia, is reproduced in full below:

> 26 June 1975.
>
> Dear Sirs,
>
> **Per: Bahagia Trading Sdn. Bhd.**
>
> **Tender for supply of punch cards, preprinted order computer cards and continuous purchase order computer forms**
>
> We act for Malaysian International Merchant Bankers Berhad of 5th Floor, Bangunan Yee Seng, Jalan Raja Chulan, Kuala Lumpur who has agreed to grant a loan to the above named company.
>
> 2. As security for the loan the said company has agreed to assign all the moneys due and payable to them by you under the provisions of the abovementioned tender contract. In this connection we enclose herewith five (5) copies of the assignment for your execution at p. 6 thereof and return please for our further attention.
>
> 3. We shall forward you a copy of the said assignment after it has been duly stamped.
>
> Yours faithfully,
> Sd.
>
> Malaysian Airline System Bhd.
> 5th Floor, Wisma Pahlawan,
> Jalan Sulaiman/Jalan Kampung Attap,
> Kuala Lumpur.
>
> c.c. (i) MIMB.
>
> (ii) Bahagia Trading Sdn. Bhd.,
> Kuala Lumpur.

Vide letter dated 2 July 1975 (Exhibit AB14) MAS returned the five documents duly executed MIMB's solicitors in the following terms:

> 2 July 1975
>
> M/s. Shook Lin & Bok,
> Advocates & solicitors,
> Bangunan Lee Wah Bank,
> Medan Pasar,
> *Kuala Lumpur.*

Dear Sirs,

Bahagia Trading Sdn. Bhd.

Tender for supply of punch cards, preprinted order computer cards and continuous purchase order computer forms

With reference to your letter TKH/9463-84/MIMB/TSB dated 26 June 1975, I return herewith, please, all the five copies of the Assignment in respect of the above duly executed by us.

Kindly forward to us a duly stamped copy of the same Assignment.

Yours faithfully,
for Malaysian Airline System Bhd.
Sd.
Khalid Mohamed

Legal Affairs Officer

Although the assignment deed was executed by MAS on 2 July 1975, by which it acknowledged the assignment (see Exhibit AB7), the deed of assignment was not executed by Bahagia/assignor till 18 March 1976, i.e. about 8½ months after acknowledgment by MAS - the stake-holder. In fact, the assignment deed itself is dated 18 March 1976. On the facts, I accept the unchallenged evidence of Mr. Chan Gak Keong (PW1) that in June 1975 he was MIMB secretary and that he signed the five copies of deed of assignment on 25 June 1975. As such it is my finding that when MAS executed the documents on 2 July 1975, in acknowledgment of the assignment, they were already executed by MIMB as assignee, though Bahagia/assignor had not signed them.

On agreed issues of law, in equitable assignment no particular form of words is required. The only thing that is necessary is to make the meaning plain. The words must clearly show **an intention that the assignee** (in this case MIMB) **is to have the benefit of the chose in action.** The assignment may be addressed **either** to the debtor (in this case MAS) **or** to the assignee. (See *Halsbury's Laws of England*, 4th Edn., Vol. 6, para. 30). In short, there must be a clear intention on the part of Bahagia/assignor that MIMB is to have the moneys due from MAS under the contract between Bahagia and MAS. Bahagia must address the assignment either to MAS or MIMB. As between the assignor and the assignee, an equitable assignment, whether voluntarily or for value, is absolute and complete without notice having been given to the debtor or fund holder. (See para. 41 of *Halsbury*). But a debtor or fundholder who has received notice of an equitable assignment must withhold all further payments to the assignor unless made with the consent of the assignee, for if he pays to the assignor without such consent, he will have to pay over again to the assignee. After notice, the debtor or fundholder becomes trustee for the assignee. (See para. 70 *Halsbury*). Thus, in *William Brandt's Sons & Co. v. Dunlop Rubber Company* [1905] AC 454, merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase money and requested the purchasers to sign an undertaking to remit the purchase money to the bank. Reversing the decision of the Court of Appeal [1904] 1 KB 387 and restoring the decision of Walton J, it was held by the House of Lords that there was evidence of equitable assignment of the debt to the bank with notice to the purchasers and that the bank could recover the debt from the purchasers. In this case, in determining whether there is clear intention on the part of Bahagia that MIMB should have the moneys due to it under its contract with MAS, I take into consideration Exhibits P1, P2 and P3. To my mind, these correspondence show, as between Bahagia and MIMB, a

clear intention on the part of Bahagia that in consideration of the loan of RM400,000, it would assign to MIMB, *inter alia*, MAS contract to the value of RM64,542. The Heads of Terms (Exhibit P2) laid out the terms and conditions of the loan as offered in Exhibit P1. The terms and conditions were accepted by Bahagia at p. 3 of Exhibit P2, and the five copies of MAS' assignment were sent by Mr. Chan Gak Keong (PW1) with other assignments to MIMB's solicitors on 25 June 1975, *vide* Exhibit P3 for their attention. In this connection, I accept the evidence of Mr. Chan that the person who signed the acceptance by Bahagia is one Ibrahim bin Medan. Mr. Chan identified the signature of acceptance as that of Ibrahim, the managing director of Bahagia. I also note that the signature is the same as the one found in the deed of assignment at Exhibit AB6 as signatory of Bahagia, the assignor. As between the Bahagia/ assignor and MIMB/ assignee, I am of the view that the equitable assignment was complete and became absolute when the acceptance of the terms and conditions as set out in the Heads of Terms was executed by Bahagia by 25 June 1975. Then notice of the equitable assignment was made to MAS on 2 July 1975, when it acknowledged the assignment in Exhibit AB7 in the following terms:

> We, Malaysian Airline System Berhad a company incorporated in Malaysia and having a place of business at 5th Floor, Wisma Pahiawan, Jalan Sulaiman/Jalan Kampung Attap, Kuala Lumpur, do hereby acknowledge that on this 2nd day of July 1975, the foregoing Assignment was intimated to us by the delivery of a true copy thereof and the same has been duly noted in our records.
>
> Singed by
> for and on behalf of
> Malaysian Airline System Berhad
>
> in the presence of:
> Sd.
>
> Legal officer
> Malaysian Airline System Berhad
> Sd.
>
> Corporate Affairs Officer
> Malaysian Airline System Berhad

In my view, the effect of this acknowledgment is that as from 2 July 1975, MAS as stake-holder became a trustee for MIMB in respect of moneys due under MAS contract with Bahagia, and MAS is liable for any payments made to anybody else other than MIMB, unless made with consent of MIMB. In equitable assignment, it is immaterial that Bahagia/assignor did not signed the deed of assignment till 18 March 1976. On the facts of the present case, I find an enforceable equitable assignment was already created by 25 June 1975, as between Bahagia and MIMB, irrespective of whether they had signed the deed of assignment. In my view, in the circumstances of this case, the signature by Bahagia is a mere formality and the deed is only relevant in that, firstly, it confirms the intention of Bahagia to give the benefit of MAS contract to MIMB, when it accepted MIMB loan offer in June 1975, and, secondly, it proves conclusively that MAS became aware of the assignment by 2 July 1975. From its letter to MIMB's solicitors dated 2 July 1975 (Exhibit AB14), I am satisfied that MAS acknowledged the assignment without any condition. The acknowledgment of the assignment in AB7 must be accepted on its face value in the absence of any explanation by Khalid bin Mohamad, the legal officer of MAS, who signed the document. By AB7, MAS does not only acknowledge the assignment of MAS contract with Bahagia to MIMB, but it also confirms that the assignment "has been duly noted" in its records. Unlike the case of *James Talcott, Ltd. v. John Lewis & Co. Ltd.* [1940] 3 All ER 592, notice of the assignment to

MAS as a debtor or stake-holder is not ambiguous. AB7 was signed by a legal officer. Further, the mere fact that there is still something to be done between assignor and assignee regarding the assignment, such as to formalize the assignment in a deed or goods under the MAS contract have not been fully supplied, does not bar the creation of an equitable assignment, once the debtor or stake-holder came to know or had acknowledged it. (See *Rossiter v. Miller* [1878] 3 AC 1124,1151; *Palmer v. Culverwell Brooks & Co.* [1902] 85 LT 758 & 759; *In re Patrick* [1891] 1 Ch 82: and *Malayawata Steel Bhd. v. Government of Malaysia* [1980] 2 MLJ 103 and *Halsbury* Vol. 6, 4th Edn., para 32). In such a case, the assignment will become enforceable when money becomes due and payable by the debtor or stake-holder. Further, Mr. Chan Gak Keong's evidence that the entire loan of RM400,000 had been disbursed by MIMB to Bahagia/assignor by 22 July 1975, has not been challenged. On this point, I accept Mr. Chan's evidence that MIMB would not have given the loan, if Bahagia had refused to assign the MAS contract. Further, both AB13 and AB15 were copied to Bahagia, and there is no evidence that it has denied or objected to the assignment. By its silence, Bahagia has consented to and confirmed the existence of the assignment by 25 June 1975, i.e., before the first payment was made by MAS to Bahagia. Mr. Chin Yew Meng; Counsel for MAS, argues that when Exhibit AB15 is read together with Exhibit AB13, there was no properly constituted contract but only an agreement between MIMB and Bahagia to assign. To my mind, the distinction between contract and agreement is not relevant for the purpose of determining the existence of an equitable assignment in this case. Once there is a clear intention on the part of Bahagia that MIMB should get the benefits of the MAS contract by conveying such intention to MIMB, an equitable assignment is created, and when the stake-holder/MAS became aware of it on 2 July 1975, it became a trustee for MIMB in respect of the moneys due under the MAS contract with Bahagia, and MAS as a debtor or stake-holder is liable to pay the sum of RM62,358 to MIMB, although it has already paid this sum to Bahagia, albeit in breach of trust.

Counsel for MAS also argues that, although the total amount payable under purchase orders AB8 to AB11 is RM64,542.30, the plaintiff only claims for RM64,542 in the statement of Claim. There being a difference of 30¢, he contends that the assignment is not absolute. It is true to constitute an enforceable assignment in equity, the assignment must be absolute and not partial. But, by paras. 1 and 2 of Statement of Agreed Facts, it is not in dispute that Bahagia had agreed to assign and transfer absolutely to MIMB the whole of the moneys payable to it from MAS under the contract. Since both parties have agreed that the assignment is absolute, it is not open for defendant now to say otherwise. In any event, what has become due and payable under the contract is the sum of RM62,358 and on the principle of *de minimis non curat lex*, this Court should ignore the 30¢ difference.

Although not covered by the agreed issues, Counsel for MAS also contends that the failure to join Bahagia as a party in these proceedings is fatal to its claim. The purpose of such joinder, according to Mr. Chin, is for accounts to be taken. In my view, where the assignment is absolute, then the assignee can sue in its own name, without joining the assignor. (See *Snell's Principle of Equity*, 27th Edn., p. 78). On the facts of the present case, Bahagia/assignor has no more interest in the debt, and since Bahagia, which apparently is now defunct, can only be joined as a defendant and not as third party, I see no purpose for such joinder by plaintiff. But, it is of course open to defendant to join the assignor as a defendant, as was done in *Sanders & Co. v. Peek* [1884] 50 LT 630. But the assignor cannot be compelled to come as a plaintiff. I am of the view that in the circumstances of the present case, the failure of assignee to join the assignor as a party is not fatal to plaintiff's claim.

On balance of probabilities on the evidence, I find it is the clear intention of Bahagia that MIMB should get the benefit of MAS contract. The defendant has not adduced any evidence to challenge such intention which is supported by PW1's testimony and corroborated by documentary exhibits. In the event, I give judgment for the plaintiff in the sum of RM62,358 and interest thereon at 6% per annum till date of payment and costs.

Also found at [1982] CLJ 319